STATE OF MICHIGAN

COURT OF APPEALS

CARL F. MENGELING,

Plaintiff-Appellant,

v

WAGNER-FLOOK BUILDER, INC., and SILER ASSOCIATES, INC,

Defendants-Appellees.

UNPUBLISHED
May 25, 2004

No. 245714
Jackson Circuit Court
LC No. 02-000101-CH

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting defendants summary disposition pursuant to MCR 2.116(C)(7). Plaintiff, Bishop of the Roman Catholic Diocese of Lansing, had filed a claim against defendants, the architect and general contractor who designed and constructed a church, for negligence that resulted in a leaking roof, discolored walls, and a warped altar. MCL 600.5839(1) provides in pertinent part that no action against architects and contractors to recover damages for defective improvements to real property may be brought more than six years after use of the improvement. According to evidence presented to the trial court, an open house was held at the new church on January 7, 1996. Plaintiff's complaint, however, was not filed until January 8, 2002. We agree with the trial court's determination that the open house constituted a "use," and on that basis, we affirm the court's ruling that the complaint was not timely filed.

Plaintiff argues that genuine issues of material fact exist that preclude the trial court from granting defendants summary disposition pursuant to MCR 2.116(C)(7). Reviewing the trial court's decision to grant summary disposition under the de novo standard, *Mouradian v Goldberg*, 256 Mich App 566, 570; 664 NW2d 805 (2003), we disagree. Summary disposition is inappropriate under MCR 2.116(C)(7), if this court determines that a genuine issue of material fact exists. *Huron Tool and Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 376-377; 532 NW2d 541 (1995).

MCL 600.5839(1) is a statute of repose. With respect to construction of an improvement to real property, the statute states that "[n]o person may maintain any action . . . more than six years after the time of . . .use . . . of the improvement." This Court stated in *Travelers Ins Co v Guardian Alarm*, 231 Mich App 473, 481; 586 NW2d 760 (1998), "the statute of repose is triggered by the time of occupancy *or* use *or* acceptance of the improvement . . . only one of the

criteria set forth in the statute of repose must be met to trigger the running of the period of limitation."

We are not persuaded by plaintiff's argument that whether the open house was a Christmas party or merely a tour constitutes a genuine issue of material fact. Although this is a question of fact, it is not an issue of material fact because the label of the event held at the church that day does not help the court determine whether the church was used that day.[1] Plaintiff also contends that, whether the church requested a temporary certificate of occupancy, although one was obtained, so that it could hold the open house on January 7, 1996, is another genuine issue of material fact. However, because the certificate is not relevant to the issue of whether and when the church was used, the question is not one of material fact. Accordingly, we are unpersuaded that genuine issues of material fact existed that precluded the trial court from granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(7).

Plaintiff also argues that the trial court erroneously used the date of the request for the temporary occupancy permit as the triggering date for calculation of the limitations period. Although we agree with plaintiff that the permit did not trigger the six-year statutory period, plaintiff mischaracterizes the trial court's ruling. The trial court did mention the permit, however, it is clear from the court's ruling that it used the date of the open house as the triggering date.

Plaintiff also argues that summary disposition was improper because the open house did not constitute "use" and the church was not put to its intended use until mass was held there on January 13, 1996. Consulting dictionary terms to determine the plain and ordinary meaning of the word "use," *Sanchez v Eagle Alloy Inc*, 254 Mich App 651, 668; 658 NW2d 510 (2003), we note that the verb "use" is defined in part as:

> 1. to employ for some purpose; put into service: *to use a knife*. 2. to avail oneself of; apply to one's own purposes: *to use the facilities*. [*Random House Webster's College Dictionary* (1997), p. 1414.]

Thus, when a person applies a facility to one's own purpose or avails oneself of a facility, use occurs. Here, the trial court was presented with undisputed evidence that the parish used the newly constructed church on January 7, 1996, for an open house. There was evidence of a flyer announcing a "Christmas Open House" to be held at the church on January 7, 1996, from 11:00 a.m. until 1:00 p.m. There was also the affidavit of the Sharon Zakrzewski, the administrative assistant for St. Catherine Labouré Catholic Church, who averred that, although there was no metal roof on the west side of the building on January 7, 1996, Wagner-Flook Builders requested a temporary occupancy permit for the parish to hold an open house at the church on that date. In addition, and as described in the flyer, the pastoral coordinator, Patricia Robertson, averred in her affidavit that the congregation would, after holding mass at the old church, conduct a processional by car to the new building to place the current altar stone in the Blessed Sacrament

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[1] See *Simerka v Pridemore*, 380 Mich 250, 275; 156 NW2d 509 (1968) for an explanation of the differences between an evidentiary fact and a material fact.

Chapel and to tour the new building.[2] While plaintiff would trivialize the open house event, the fact of the matter is that an organized public and published event was conducted under the authority of a temporary certificate of occupancy on the site, and the facility was utilized or used for a purpose consistent with and common to the congregated church community.

Although plaintiff suggests that this Court interpret the word "use" to mean to use for an intended purpose, *i.e.*, the holding of mass, the Legislature has not employed such a limiting construction. This Court may not rewrite MCL 600.5839(1) by carving out subjective undefined exceptions to use that the Legislature did not provide. See *Ambs v Kalamazoo County Road Com'n*, 255 Mich App 637, 650; 662 NW2d 424, 431 (2003), in which this Court said that "a court's constitutional obligation is to interpret, not rewrite, the law." Because the Legislature never limited the word "use" in MCL 600.5839(1) by providing that an improvement is only used when it is put to its "intended use," we conclude that the trial court correctly determined that the newly constructed church was in use, within the meaning of the statute, when the parish held an open house at the facility on January 7, 1996. Thus, the trial court correctly concluded that the plaintiff's January 8, 2002, complaint was barred by the six-year period set forth in MCL 600.5839(1).

Plaintiff also argues on appeal that defendants should be estopped from raising the statute of limitations as a defense because they agreed to make the repairs and had a duty to notify the pastoral coordinator if they did not intend to make those repairs. Because plaintiff failed to furnish the trial court with any evidence of an agreement that defendants entered into to make the repairs, he has not preserved this issue. An appellate court is obligated to review only issues that are properly raised and preserved. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994). Generally, an issue is not properly preserved if it is not raised before and addressed and decided by the trial court or administrative tribunal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Nor has plaintiff provided any evidence in support of its assertion of estoppel that defendants knew as early as May of 2001, that plaintiff would take legal action. Because this issue was not one set forth in the questions presented, we decline to address it, *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

Affirmed.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Pat M. Donofrio

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[2] In his appellate brief, plaintiff directs this Court's attention to several affidavits that were not presented to the trial court at the summary disposition phase, including the November 27, 2002 affidavit of Patricia Robertson as well as the affidavits of Joyce and John Rochow. Because these affidavits do not alter, and are consistent with, the material facts they do not aid in the issue of use. For purposes of review we assume no food was served.